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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~1119~~ 219

EVELYN EDWARDS,

Petitioner,

—v.—

DOCTORS HOSPITAL, INC., SEYMOUR WIMPFHEIMER, IRVING SOMACH and WILLIAM MURPHY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the District Court (Appendix A, *infra*, p. 17) is not officially reported. The opinion of the District Court extending the time to appeal (Appendix A, *infra*, p. 19) is not officially reported. The opinion of the Court of Appeals (Appendix A, *infra*, p. 20) is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered April 1, 1957 (Appendix A, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254. The Court of first instance obtained jurisdiction under diversity of citizenship, the plaintiff being a resident of California and defendants residents of New York.

Questions Presented

1. Whether, under the Federal Rules of Civil Procedure, the time within which to appeal runs from the date of the District Court's direction of a verdict and of a docket entry stating that the defendants' motions for a directed verdict had been granted, or from the later date on which the formal judgment was signed by the judge and a docket entry made stating "Judgment filed dismissing cause on the merits with costs taxed at $20.00. Judgment docketed."

2. Whether a Court of Appeals may exercise jurisdiction over an order of the district court extending the time to appeal under Rule 73(a) from which no appeal has been taken.

Rules Involved

Federal Rules of Civil Procedure:

> "RULE 54. JUDGMENTS; COSTS.
>
> (a) *Definition; Form.* 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.
>
> * * * * *

Rule 58 [As amended December 27, 1948].

ENTRY OF JUDGMENT.

Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

Rule 73 [As amended December 27, 1946, and December 29, 1948]. APPEAL TO A COURT OF APPEALS.

(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. * * *

A party may appeal from a judgment by filing with the district court a notice of appeal. * * *

* * * * *

Rule 79 [As amended December 27, 1946, and December 29, 1948]. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN.

(a) *Civil Docket.* The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word 'jury' on the folio assigned to that action."

* * * * *

Civil Rules of Southern and Eastern Districts of New York.

"Rule 10—ENTRY OF ORDER OR JUDGMENT.

The attorney causing the entry of an order or judgment shall append to or endorse upon it a list of the names of the parties entitled to be notified of the entry thereof and the names and addresses of their respective attorneys."

Statement

Petitioner, while undergoing an operation for a hysterectomy under anaesthesia, sustained permanent paralysis of her right hand, a previously healthy member, sued respondents for malpractice, claiming under the rule of *res ipsa loquitur* that an accident of such unusual nature does not happen in the absence of negligence.

Upon the trial, the respondents offered no proof and on March 26, 1956, at the close of the case, moved for a directed verdict and for a dismissal of the complaint. The Trial Court granted the motion for a directed verdict but did not rule on the motion to dismiss the complaint (Appendix A, *infra*, p. 17). On the same day the clerk made the following docket entry (Appendix A, p. 16):

> "BYERS, *J.* Case called. Trial resumed. Plaintiff rests. All defendants move for a dismissal of the complaint and direction of a verdict. Motions granted. Court directs a verdict for each defendant. Jury discharged."

On April 10, 1956, the Trial Judge signed a formal judgment dismissing the complaint on the merits (Appendix A, p. 18). The judgment was submitted by counsel under Civil Rule 10 of the Southern and Eastern Districts of New York. On that day the clerk made the following docket entry:

> "By Byers, *J.* Judgment filed dismissing cause on the merits with costs taxed at $20.00. Judgment docketed."

On May 29, 1956, petitioner moved under Rule 73(a) for an extension of time to appeal. The motion was opposed on the ground that the direction of a verdict combined with the docket entry of March 26, 1956 constituted the final judgment

and that therefore the time within which to move under Rule 73(a) for an extension of time to appeal had expired. Petitioner claimed the formal judgment of April 10, 1956, dismissing the complaint on the merits was intended as the final judgment. The District Judge made the following determination of the questions presented:

> "Motion by plaintiff for an extension of time to appeal from the judgment herein. After hearing oral argument, and reading all the papers I find that the judgment herein was entered on April 10, 1956, and there is a showing of excusable neglect based on failure to learn of the entry of the judgment, and therefore I hereby grant this motion and extend plaintiff's time to appeal from the judgment to and including June 9, 1956 (Title 28 U. S. C. A., Sec. 2107, Rule 73 R. C. P.)"

The petitioner filed her notice of appeal on June 8, 1956. The Court of Appeals, holding that "under our ruling in *F. & M. Schaefer Brewing Co.* v. *United States*, 236 Fed. 2d 889, • • • the notice of appeal came too late" dismissed the appeal as not timely filed (Appendix A, *infra*, p. 22).

Reasons For Granting The Writ

The decision below holding that the direction of a verdict by the District Judge, rather than the formal judgment which the Judge signed at a later date, was the judgment, and that the clerk's notation of the direction of a verdict, rather than his notation of the later judgment, was the entry of judgment which determined the period within which notice of appeal could be filed, raises an important procedural question of general applicability concerning the proper construction to be placed upon Rules 58, 73(a) and 79(a) of the Federal Rules of Civil Procedure.

In a preface to the dismissal in this case the Court below said:

> "In these three separate and distinct, but companion cases, motions to dismiss the several appeals were argued before us on March 4, 1957. As each motion relates to a phase of the subject matter of Chief Justice Clark's opinion, written for a unanimous *en banc* court, in F. & M. Schaefer Brewing Co. v. United States, 236 F. 2d 889, we shall dispose of the three motions together."

The importance of the procedural question raised here "goes beyond the fortunes of this particular case." It was recognized by the Court of Appeals for the Second Circuit in the *Schaefer* case, upon the authority of which this case was dismissed, as follows:

> "But we do not reach the merits, since we dispose of the appeal on a motion made by appellee to dismiss it on the ground that it was not timely taken. Originally the issues were argued before a panel of this court consisting of Judges Medina, Hincks and Waterman; but since the motion presented an important question of practice and procedure going beyond the fortunes of this particular case, we determined that adjudication should be made by the full personnel of active circuit judges."

The decision in the *Schaefer* case, was that the memorandum decision of the District Judge which granted a motion for summary judgment, rather than the formal judgment which the Judge signed at a later date, was the judgment, and that the clerk's notation of the memorandum decision, rather than his notation of the later judgment, was the entry of judgment which determined the period within which notice of appeal could be filed.

Applying that standard to this case the Court below held that the determination made by Judge Byers on March 26,

constituted the date of entry of the final judgment; that the signing of a subsequent judgment by the trial judge was a mere formality (Appendix A, p. 22) and that "the notice of appeal, based upon a computation from April 10 (the date of the entry of the signed formal judgment) came too late" (Appendix A, p. 22).

The procedural question as to the proper construction to be placed upon Rules 58, 73(a) and 79(a) of the Federal Rules of Civil Procedure raises jurisdictional issues upon which the Courts of Appeals have expressed conflicting views which ought to be settled by this Court so that litigants may know with certainty when an appeal from a judgment of a district court will be timely. A resolution of the differences between the courts of appeal upon the interpretation of the rules will create certainty in an area in which certainty is essential.

In the *Schaefer* case, the Government filed a petition for a writ of certiorari upon this question which has since been granted by this Court.* We adopt, substantially *in toto*, the argument of the Government in support of its petition for certiorari, since *Schaefer* touches precisely and directly those matters upon which the Court below stated that the dismissal in this case turns.

1. The decision below in this case and in the *Schaefer* case, is in conflict with *United States* v. *Higginson*, 238 F. 2d 439 (C. A. 1); *Cedar Creek Oil and Gas Co.* v. *Fidelity Gas Co.*, 238 F. 2d 298 (C. A. 9); and *Papanikolaou* v. *Atlantic Freighters*, 232 F. 2d 663 (C. A. 4). It is also out of harmony with this Court's decision in *United States* v. *Hark*, 320 U. S. 531, rehearing denied, 321 U. S. 802.

"The problem of what constitutes a final judgment has been treated by most of the circuit courts, but without a great degree of uniformity." *United States* v. *Higginson*, *supra*, p. 442. This lack of uniformity is exemplified by the

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*No. 761; March 25, 1957. Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit, granted and the case transferred to the summary calendar.

application of the rules by the Court below in the present case, the conflicting views of the First Circuit in the subsequent decision in the *Higginson* case, *supra*, and by the decision of the Court below in the later case of *Matteson* v. *United States* (238 F. 2d 439).

In the *Schaefer* case, as we have noted, the district judge's memorandum decision, in which the granting of the taxpayer's motion for summary judgment was announced, was held to be the judgment and the clerk's notation of the decision in the civil docket was held to be the entry of judgment which started the appeal period under Rule 73(a) (*supra*, p. 3). The subsequent, formal judgment signed by the judge and the entry of that judgment by the clerk were considered "ineffective to delay the judgment or extend the time of appeal" (236 F. 2d at 892). In the *Higginson* case, however, the memorandum opinion of the district judge, which stated that "judgment must be entered for the plaintiffs" (238 F. 2d at 442), was held not to be the judgment, and the notation of that adjudication made by the clerk in the civil docket was held not to be the entry of judgment. Instead, the formal judgment, signed at a later date by the judge, was held to be the judgment and the notation of that judgment by the clerk was held to be the entry of judgment which marked the commencement of the appeal period. The First Circuit, relying on this Court's decision in *United States* v. *Hark*, 320 U. S. 531, rehearing denied, 321 U. S. 802, and on its own prior decision in *In re Forstner Chain Corp.*, 177 F. 2d 572 (C. A. 1), stated (per Hartigan, *J.*, 238 F. 2d at 442):

> "* * * it can be gathered from the language of the formal judgment of February 23, 1956, and from the fact of its rendition and entry that neither the district judge nor the clerk regarded the reference in the opinion nor the first entry as a judgment or entry of judgment."

In the *Schaefer* case, the court stated that its conclusion (*i.* e., that the memorandum decision was the judgment contemplated by the Federal Rules of Civil Procedure) was fortified by Rule 10 (a) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York to the effect that a "memorandum of the determination of a motion, signed by the judge, shall constitute the order" (236 F. 2d at 892). In the *Higginson* case, the First Circuit noted that no similar local rule was there involved; it stated, however (238 F. 2d at 443): "To the extent that the language of the *Schaefer* opinion might apply even where no such local rule exists, this decision is not in accord with it."

That the *Schaefer* case was not decided on the basis of the local rule and that there is a direct conflict between these circuits regarding the proper application of the Rules is evidenced by the Second Circuit's later decision in *Matteson* v. *United States*, *supra*. Judge Clark, again speaking for the court, explained that in the *Schaefer* case, "we viewed the local rule as merely corroborative of the practice actually required by F. R. 58" and stated that "Judge Hartigan's opinion must be taken as disapproving our reasoning." Summarizing the conflicting views of these two circuits, the *Matteson* opinion states:

> "But what points up our difference of view is that we do not think the trial judge's original statement is subject to reassessment and definition on the basis of his having later signed a formal judgment presented to him by counsel, whereas our brothers of the First Circuit conclude that his later action demonstrates that his first action was not intended to be a final adjudication."

In the present case local Rule 10 of the Civil Rules of the Southern and Eastern Districts of New York controls "Entry of Judgment" and, agreeably with Rule 73(a) F. R. C. P. (which permits an extension of time to appeal where a party

fails to learn of the entry of judgment against him), requires "the attorney causing the entry of judgment" to endorse thereon the names of parties and counsel entitled to notice of entry of judgment (*supra*, p. 4).[2] This is the formal judgment signed by the judge.

Cedar Creek Oil and Gas Co. v. *Fidelity Gas Co.*, 238 F. 2d 298 (C. A. 9), is another recent example of disagreement in this area. In that case the trial judge had issued a memorandum opinion, together with findings of fact and conclusions of law which stated that the defendant was entitled to prevail and which concluded by stating that "Judgment is hereby Ordered to be entered accordingly" (238 F. 2d at 299). The clerk's notation recited, among other things, that there had been "[f]iled and entered judgment in favor of defendants * * *." The court of appeals held, however, that the time for appeal started to run later when a formal judgment had been signed and notation thereof had been made by the clerk. Commenting on the judge's signing of a formal judgment and the clerk's notation of it, the court said: "It should not be presumed or assumed they had an intent to do a useless act. If the first acts are ambiguous, we think the later acts afford circumstantial evidence of the intent in the first acts" (238 F. 2d at 301).

The Fourth Circuit, contrary to the Second Circuit, has also regarded the signing of a formal judgment as being inconsistent with a conclusion that a prior announcement of adjudication was the judgment. In *Papanikolaou* v. *Atlantic Freighters*, 232 F. 2d 663 (C. A. 4), a memorandum opinion signed and filed by the district judge which stated that the suit was dismissed was held not to be the judgment in view of the fact that the district judge had later signed a "final order" decreeing that the suit be dismissed. Pointing to the fact that "the judge deemed it necessary or desirable to file a formal judgment of dismissal" (232 F. 2d at 665), the court concluded that the parties "were justified in regarding this as the final judgment disposing of the case."

While *United States* v. *Hark*, 320 U. S. 531, was a criminal case, the views of this Court concerning the significance that attaches to the signing of a formal order by the district judge cannot be reconciled with those of the Second Circuit in the present case as well as in *Schaefer* and in *Matteson* v. *United States*, *supra*. The opinion in *Hark* states (pp. 534-535):

> "Where, as here, a formal judgment is signed by the judge, this is *prima facie* the decision or judgment rather than a statement in an opinion or a docket entry. * * * The judge was conscious, as we are, that he was without power to extend the time for appeal. He entered a formal order of record. We are unwilling to assume that he deemed this an empty form or that he acted from a purpose indirectly to extend the appeal time, which he could not do overtly. In the absence of anything of record to lead to a contrary conclusion, we take the formal order of March 31 as in fact and in law the pronouncement of the court's judgment and as fixing the date from which the time for appeal ran."

In sum, because, as was noted in the *Higginson* case (238 F. 2d at 442), "the Federal Rules do not spell out the meaning of a 'final judgment'" and the terms used "have to be judicially defined if the rules are to be meaningful," and because of the conflicting decisions of the courts of appeals, an authoritative ruling by this Court is necessary.

2. The decision below is in conflict with *O'Brien* v. *Harrington* (C. A. 5) 233 F. 2d 17, on the proper interpretation of Rule 79(a). The entry of judgment which starts the appeal period under Rule 73(a) must be a notation in the civil docket, as provided for in Rule 58. Rule 79(a) requires that the notation show "the substance of each order or judgment of the Court * * *."

The docket entry in the present case, made on March 26 states: "* * * All defendants move for dismissal of the complaint and direction of a verdict. Motions granted." Ac-

tually, the motions to dismiss the complaint were not granted.*

The clerk's notation to that effect was therefore made without the direction of the court. In that regard the Court below decided that "There was no occasion for him (the judge) to separately pass upon the motions by defendants to dismiss the complaint as the dismissal followed as a matter of law upon the direction of a verdict in favor of defendants."

Dismissal of the complaint is not ministerial. It is a matter of substance and is part of the judicial function.

In *O'Brien* v. *Harrington*, the Court observed that the docket entry was "not a correct notation of the substance of the Court's judgment," and in its opinion stated (p. 19):

> "The clerk's act in entering a judgment is ministerial and when he fails accurately to note in the civil docket the substance of a judgment which he has before him he is guilty of a clerical misprision. A docket entry which indicates a judgment directly opposite to the courts decision must be set aside as improvidently entered without the direction of the court. Consequently the court's judgment with respect to the claim for declaratory relief has never been entered and has never become effective."

3. The decision below raises an important question as to the power of a Court of Appeals to entertain jurisdiction over a determination of the District Court which is not the subject of an appeal.

A Court of Appeals may not disregard as a nullity a formal final order duly made by a district judge in the exercise of a jurisdiction specifically conferred upon him when the order is appealable and no appeal has been taken therefrom.

Under Rule 73(a) Judge Inch had the power, in a proper case of the excusable neglect of a party to learn of the entry of judgment against him, to extend the time to appeal for an

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* The complaint was first dismissed on April 10, 1956 by the formal judgment.

additional thirty days from the entry of the final judgment appealed from.

The intention of the Trial Judge, to be ascertained from the record, is controlling upon the question as to when a final judgment has been pronounced by him (*F. & M. Schaefer Brewing Co. v. United States, supra*, at page 892). "Whether such a (final) judgment has been rendered depends primarily upon the intention of the Court, as gathered from the record as a whole * * *." (*Re: Forstner Chain Corp., supra*, at page 576). Intention is a question of fact. The question having been presented to him, Judge Inch had jurisdiction to determine that question from the record. Rule 73(a). After a hearing in open court upon notice (Appendix A, *infra*, p. 17), he made a final order determining that question as follows:

> "Motion by plaintiff for an extension of time to appeal from the judgment herein. After hearing oral argument and reading all the papers, I find that the judgment herein was entered on April 10, 1956 * * *."

The Order of Judge Inch (Appendix A, *infra*, p. 19), extending the time to appeal upon the basis of a final judgment entered April 10, 1956 is a final decision within the meaning of 28 U. S. C. 1291, and appealable as such: "We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the original cause of action, and does not require consideration with it," and because it is "separable from, and collateral to the rights asserted in the action." (*Cohen v. Beneficial Loan Industries Corp.*, 337 U. S. 541, 545.)

Since no appeal was ever taken from order of Judge Inch it was *res judicata* that judgment was entered April 10, 1956.

It was not competent for the Court below to make its own determination that final judgment was entered on a date different from the date found by the District Court. There are now two orders—Judge Inch's Order and the Order of the Court below. The latter impeaches the former, and there are two inconsistent adjudications of record. The determination of the question was not an adjudication of the existence of

jurisdiction. It was the determination of a question of fact, namely the state of mind of the District Judge as reflected in the record; the existence or absence of jurisdiction could be determined only after that question of fact had been settled. Upon that question of fact, the Court below, having exclusively an appellate jurisdiction, exercised, in the absence of an appeal, an original jurisdiction with which Courts of Appeal are not endowed.

This constitutes so far a departure from the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

4. The issues presented by this petition are of obvious importance, affecting as they do all litigants in the federal courts. The importance of the first question presented was recognized by the Court of Appeals for the Second Circuit which adopted the unusual procedure of having the full membership of the court consider the *Schaefer* case, upon the authority of which there was a dismissal in this case. The present, conflicting views of the courts of appeals concerning the timeliness of appeals should be resolved so that controversies may be decided on their merits and so that appeals will not be dismissed simply because an appellant is unable to determine from the rules when an appeal is timely. The existing "patchwork" which makes it "difficult to know just when, in appellate eyes, a litigant has a judgment" (*Matteson* v. *United States*, *supra*), can be remedied only by definitive clarification by this Court, to the end that the Federal Rules will perform their function of securing (Rule 1) "the just, speedy, and inexpensive determination of every action."

Finally, this Court should settle the propriety of the exercise of original jurisdiction by a Court of Appeals.

CONCLUSION

THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

IRVING LEMOV,
Attorney for Petitioner.

June 18, 1957.

APPENDIX A

Edwards vs. Doctors Hospital, et al.—Extracts from Docket Entries

In the United States District Court for the Eastern District of New York

Civil Docket 12897

1952		
Sept.	16	Complaint filed. Summons issued
		• • •
Oct.	7	Answer of Wimpfheimer & Somach filed
"	15	" " " Doctors Hosp—with Jury demand filed
		• • •
"	27	Answer filed by Deft. Murphy
		• • •
1956		
March	22	Byers, J., case called trial ordered & adjd to 3/23/56
"	23	Byers, J., case called trial Resumed & adjd to 3/26/56
"	26	Byers, J., case called trial Resumed. Plaintiff rests. All defts. move for the dismissal of the complaint and direction of a verdict. Motions granted. Court directs verdict for each defendant. Jury discharged.
April	10	Bill of costs filed with costs taxed at $20.00
"	"	By Byers, J. Judgment filed dismissing cause on the merits with costs taxed at $20. Judgment docketed

May 31 Inch, J. order to show cause (signed 5/29/56) filed with proof of service, to grant extension to file notice of appeal (5-31-56)

" " Before Inch, J. Hearing on order to show cause argued. Decision reserved.

• • •

June 1 By Inch, J. Decision rendered granting motion extending time to file appeal to June 9, 1956 (See memo attached to papers)

" 5 By Inch, J. Order filed granting motion extending time to file appeal to June 9, 1956

" 8 Notice of Appeal & Bond filed.

Opinion of the Court Directing Verdict for Defendants

[226] The Court: Members of the jury, I believe it is the Court's duty to relieve you of the responsibility of a decision in this case. I propose to direct a verdict for the defendants.

• • •

Therefore the defendants' motions for a verdict are hereby granted.

Judgment

(CAPTION OMITTED)

(Civil Action File No. 12897)

This cause came on for trial before the Court and a jury on the 22nd day of March, 1956, all parties appearing by counsel, and the Court on motion of defendants having directed the jury to render a verdict for the defendants, dismissing the complaint, and the jury having done so,

It is hereby ORDERED, ADJUDGED AND DECREED that the action be dismissed on the merits, and that defendants recover their costs taxed in the sum of Twenty Dollars ($20.00), and that they have execution therefor.

Approved:

Dated: Brooklyn, New York,
April 10, 1956.

MORTIMER W. BYERS,
U. S. D. J.

Judgment for costs rendered:

Dated: April 10, 1956

PERCY G. B. GILKES,
Clerk of U. S. District Court.

Order

(CAPTION OMITTED)

(Civil Action #12897.)

A motion having been made by plaintiff in the within-entitled action to extend plaintiff's time to file a notice of appeal under Rule 73(A) of the Rules of Civil Procedure, and the motion having duly come on to be heard before the undersigned on the 31st day of May, 1956, and due deliberation having been had thereon, and the Court having, by a memorandum decision dated June 1st, 1956, ruled that there has been a showing of excusable neglect in the taking of an appeal within thirty (30) days from the entry of the judgment, it is, on motion of Irving Lemov, attorney for plaintiff,

ORDERED, that the motion be and the same hereby is granted, and that the time of the plaintiff to take an appeal from the judgment entered in the within action on the 10th day of April, 1956, be extended up to and including June 9th, 1956.

Dated: New York, N. Y.,
June 4th, 1956.

ROBERT A. INCH,
Chief Judge, U. S. District Court.

Opinion by Court of Appeals

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

October Term, 1956.

(Motions Argued March 4, 1957—Decided April 1, 1957.)

EVELYN EDWARDS,

Plaintiff-Appellant,

—against—

DOCTORS HOSPITAL, INC., SEYMOUR WIMPFHEIMER, IRVING SOMACH and WILLIAM MURPHY,

Defendants-Appellees.

* * *

Before:

MEDINA and WATERMAN, *Circuit Judges*, and GALSTON, *District Judge*.

These are motions to dismiss appeals for lack of timely service of the notice of appeal.

IRVING LEMOV, New York City, for plaintiff-appellant, Evelyn Edwards.

GALLI & LOCKER, New York City (Lawrence J. McGinn, New York City, of Counsel), for defendant-appellee, Doctors Hospital, Inc.

MARTIN, CLEARWATER & BELL, New York City (John J. De Luca, New York City, of Counsel), for defendants-appellees, Wimpfheimer and Somach.

DEBEVOISE, PLIMPTON & MCLEAN, New York City (Daniel W. West, New York City, of Counsel), for defendant-appellee, William Murphy.

* * *

MEDINA, *Circuit Judge:*

In these three separate and distinct but companion cases, motions to dismiss the several appeals were argued before us on March 4, 1957. As each motion relates to a phase of the subject matter of Chief Judge Clark's opinion, written for a unanimous *en banc* court, in *F. & M. Schaefer Brewing Co. v. United States*, 236 F. 2d 889, we shall dispose of the three motions together.

I.

Edwards v. Doctors Hospital, Inc. et al.

These are motions by various defendants-appellees to dismiss plaintiff's appeal for lack of timely service of the notice of appeal, and a cross motion by appellant for leave to file appellant's brief and appendix in the event of the denial of the motions to dismiss.

At the conclusion of plaintiff's case, Judge Byers granted the motions of appellees for a directed verdict on March 26, 1956, and the docket entry made on the same date reads:

> Byers J. Case called. Trial resumed. Plaintiff rests. All defendants move for dismissal of the complaint and direction of a verdict. Motions granted. Court directs verdict for each defendant. Jury discharged.

On April 10th costs were taxed and Judge Byers signed a formal judgment, submitted by appellee William Murphy. As has happened in the past, there was a miscalculation of the time within which to serve the notice of appeal, due to the erroneous assumption that the time to appeal ran from the service of a copy of the formal judgment, with notice of the entry thereof, according to the practice in vogue in the New York State Courts.

The determination made by Judge Byers on March 26, 1956, followed by the docket entry, decided the case with finality. There was no occasion for him separately to pass upon the motions by defendants to dismiss the complaint as the dismissal followed as matter of law upon the direction of a verdict in favor of defendants.

Under our ruling in *F. & M. Schaefer Brewing Co.* v. *United States*, 236 F. 2d 889, and a long series of earlier cases cited therein; the notice of appeal, based upon a computation from April 10 came too late.

Another curious feature of the case is that after the time to appeal had fully expired, and there remained no possibility of giving our Court jurisdiction of the case, appellant made a motion on May 29, 1956, allegedly pursuant to Rule 73(a) of the Federal Rules of Civil Procedure, for an extension of time within which to file an appeal to this Court, on the ground of "excusable neglect based on a failure of a party to learn of the entry of the judgment."

Since the judgment was final on March 26, the appellant had 30 days until April 25 to file his notice of appeal and an additional 30 days to petition the lower court for an extension of time under Rule 73(a) on a showing of excusable neglect. However, this time expired on May 25 and since Rule 73(a) is "mandatory and jurisdictional" and "cannot be extended by * * * order of the court" (*Marten* v. *Hess*, 6 Cir., 176 F. 2d 834), Judge Inch's order on May 31 is a nullity and of no effect. *Naughley* v. *Pennsylvania R. Co.*, 3 Cir., 230 F. 2d 387; *Howard* v. *Local 7½*, 7 Cir., 208 F. 2d 930, 932; *Slater* v. *Peyser*, D. C. Cir., 200 F. 2d 360.

Accordingly, we have no jurisdiction over this appeal and it is dismissed; and the cross-motion falls of its own weight.

* * *

Judgment

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of April, one thousand nine hundred and fifty-seven.

Present: HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges,
HON. CLARENCE G. GALSTON,
District Judge.

EVELYN EDWARDS,

Plaintiff-Appellant,

—against—

DOCTORS HOSPITAL, INC., SEYMOUR WIMPFHEIMER, IRVING SOMACH and WILLIAM MURPHY,

Defendants-Appellees.

JUDGMENT

NOTE—[Stamped:] United States Court of Appeals, Second Circuit. Filed April 1, 1957. A. Daniel Fusaro, Clerk.

Motions having been made herein by counsel for the appellees to dismiss the appeal for lack of jurisdiction, and a motion having been made by counsel for the appellant for leave to file appellant's brief and appendix,

Upon consideration thereof, it is

ORDERED that the motions to dismiss the appeal be and they hereby are granted, and that said appeal be and it hereby is dismissed.

A. DANIEL FUSARO,
Clerk